Filed 3/16/10 Teruel-Armstrong v. Borg-Warner Morsetec, Inc. CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| VIVIANA TERUEL-ARMSTRONG et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>BORG-WARNER MORSETEC, INC., et al.,<br><br>Defendants and Respondents. | B215119<br><br>(Los Angeles County Super. Ct. No. BC378833) |

APPEALS from judgments of the Superior Court of Los Angeles County, William F. Fahey, Judge. Reversed with directions.

Paul & Hanley, Dean A. Hanley and Kelly A. McMeekin for Plaintiffs and Appellants.

Booth, Mitchel & Strange and Christopher C. Lewi for Defendant and Respondent Borg-Warner Morsetec, Inc.

Brady, Vorwerck, Ryder & Caspino, Timothy X. Lane and David C. Olson for Defendant and Respondent Volvo Cars of North America, LLC.

Viviana Teruel-Armstrong and others appeal summary judgments in favor of Borg-Warner Morsetec, Inc. (Borg-Warner), and Volvo Cars of North America, LLC (Volvo), in a wrongful death action arising from exposure to asbestos. The trial court ordered the exclusion of plaintiffs' sole product identification witness after he failed to timely search for and produce documents demanded in a deposition subpoena. The court subsequently awarded summary judgment in favor of Borg-Warner and Volvo based on plaintiffs' inability to prove that the decedent was exposed to the defendants' products. Plaintiffs contend the trial court had no authority to impose an evidence sanction for a third party deponent's purported failure to comply with a deposition subpoena and had no authority to do so on an ex parte application without a noticed motion.

We conclude that the court had no statutory authority to impose an evidence sanction in these circumstances and that there was no showing of egregious misconduct sufficient to justify the imposition of the sanction based on the court's inherent authority. We therefore will reverse the judgments.

## ***FACTUAL AND PROCEDURAL BACKGROUND***

### 1. *Factual Background*

Cristobal Teruel worked as an automobile mechanic in the 1970's and 1980's, including work at a repair shop owned by Arnold Sutton from 1976 to 1978. Teruel was diagnosed with mesothelioma and died in October 2006 at the age of 74. He was survived by his wife, Ruth Teruel, and children Viviana Teruel-Armstrong, Mario Teruel, and Daniela Teruel.

2. *Complaint*

Viviana Teruel-Armstrong, individually and as guardian ad litem for Ruth Teruel, Mario Teruel, and Daniela Teruel, filed a complaint against Borg-Warner, Volvo, Ford Motor Company (Ford), General Motors Corporation (General Motors), and others in October 2007. Plaintiffs allege 15 counts seeking damages for personal injuries and wrongful death allegedly caused by the decedent's exposure to asbestos.

3. *Sutton Deposition and Related Proceedings*

The trial court scheduled a trial date of January 12, 2009. Plaintiffs filed their case report on June 20, 2008, pursuant to general order No. 29 applicable to asbestos cases. The case report identified Sutton as plaintiffs' sole product identification witness. Plaintiffs initially noticed Sutton's deposition to take place on June 27, 2008. The day before the scheduled date, plaintiffs continued the deposition to July 2, 2008. The day before the scheduled date, plaintiffs continued the deposition again to July 16, 2008. The day before the scheduled date, plaintiffs continued the deposition a third time to August 5, 2008. The day before the scheduled date, plaintiffs continued the deposition a fourth time to an undetermined date.

Ford and General Motors moved to continue the trial date. The trial court denied the motion on September 17, 2008, and ordered the parties to "meet and confer and come to agreement as to a proposed schedule for the completion of depositions and hearings on Motions for Summary Judgment." The parties later stipulated that

summary judgment motions could be heard on 30 days' notice and must be filed and served by November 19, 2008.[1]

Ford and General Motors personally served a deposition subpoena on Sutton on September 19, 2008, setting a deposition to take place on October 7, 2008, beginning at 9:00 a.m. The subpoena included a demand for production of 29 categories of documents. Plaintiffs then notified the defendants, however, that Sutton would appear for deposition before that date, on October 1, 2008, beginning at 2:00 p.m.

The Sutton deposition commenced on the afternoon of October 1, 2008, and lasted approximately 3 hours. During that time, only plaintiffs' counsel questioned the witness. Plaintiffs' counsel advised the defendants at the deposition that his firm represented Sutton and would coordinate the scheduling of the continuation of the deposition. Plaintiffs' counsel declined to resume the deposition on October 7, 2008, the date that Ford and General Motors had previously noticed, and stated that plaintiffs intended to name 20 to 25 new defendants and move the court to continue the trial date. Ford and General Motors notified the other parties that the deposition would be postponed. Plaintiffs' counsel also declined to resume the deposition on other dates suggested by the defendants.

Borg-Warner moved to continue the trial date. The trial court denied the motion on October 27, 2008.

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[1] We judicially notice the stipulation and order filed on September 23, 2008. (Evid. Code, § 452, subd. (d).)

Ford and General Motors filed an ex parte application on November 4, 2008, for an order shortening time for notice of a hearing on a motion to exclude Sutton as a witness or, in the alternative, to compel his deposition and continue the trial date. The defendants argued that plaintiffs' counsel's failure to produce Sutton for further deposition, including cross-examination, despite numerous requests justified his exclusion as a witness, and that the trial date should be continued to allow them time to prepare and file summary judgment motions.

At the ex parte hearing on November 4, 2008, plaintiffs' counsel acknowledged that his firm represented Sutton and stated that the witness was very busy and had made it difficult to schedule the deposition. Plaintiffs' counsel also stated that plaintiffs had intended to name additional defendants before scheduling the continued deposition. The court stated that plaintiffs' counsel had been dilatory and should exercise some control over Sutton as his client. The court granted the ex parte application in part. A minute order filed on November 4, 2008, stated, "the deposition of Arnold Sutton will take place on or before 11-12-08, or sanctions including terminating sanctions may be imposed."

Plaintiffs filed amendments to the complaint on November 4, 2008, naming 13 additional defendants. Plaintiffs filed an ex parte application on November 7, 2008, to continue the trial date or extend the deadline to complete the Sutton deposition. They stated that they had named the new defendants based on information provided by Sutton in his deposition on October 1, 2008, and that the Sutton deposition should not be completed until all defendants had appeared. Plaintiffs' counsel declared that he had so

informed the defendants at the deposition and that no defendant had objected. He declared that Sutton had never refused to testify or to complete his deposition, but had only requested that counsel accommodate his busy schedule. The court denied the application. The order stated that the court previously had ordered plaintiffs' counsel to make Sutton available for the completion of his deposition by November 12, 2008, and that plaintiffs had shown no grounds for reconsideration of that ruling pursuant to Code of Civil Procedure section 1008.[2]

Plaintiffs' counsel notified the parties on the afternoon of November 7, 2008, that the Sutton deposition would resume on November 10, 2008. The deposition resumed on November 10, 2008, and counsel for the defendants questioned the witness on November 10 and 11. Sutton testified at the deposition that he was not familiar with the deposition subpoena, had not reviewed it with his attorney, and had not searched for the requested documents.

4. *Ex Parte Application to Exclude Witness Testimony*

Ford and General Motors filed an ex parte application on November 18, 2008, for an order excluding Sutton as a witness. The defendants argued that by failing to ensure that Sutton searched for and timely produced the documents demanded in the deposition subpoena, plaintiffs and plaintiffs' counsel had violated the order of November 4, 2008. They argued that the production of documents requested in the deposition subpoena was implicit in the order of November 4. They argued that the

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[2] We judicially notice the order dated November 7, 2008. (Evid. Code, § 452, subd. (d).)

exclusion of Sutton's testimony was an appropriate sanction pursuant to Code of Civil Procedure sections 2023.010, 2023.030, and 2025.480.

At the ex parte hearing on November 18, 2008, plaintiffs' counsel argued that an evidence sanction was unwarranted and could not be imposed on an ex parte application without a noticed motion. Plaintiffs' counsel requested additional time to review the record and file a written opposition. Plaintiffs' counsel stated that she would review the documents in Sutton's possession to determine whether there were any documents responsive to the deposition subpoena. After further argument, the court stated that plaintiffs could file a written opposition by noon on November 21, 2008. The court also extended the time for the parties to file motions for summary judgment to November 26, 2008.

Plaintiffs filed an opposition on November 20, 2008, arguing that the exclusion of Sutton's testimony would amount to a terminating sanction, that the court had no authority to impose such a sanction on an ex parte application, and that the time allowed by the court to prepare and file an opposition was insufficient. Plaintiffs briefly argued that the deposition had proceeded for more than two days, that they had complied with the prior order compelling Sutton's deposition, and that his failure to search for responsive documents did not render his deposition testimony meaningless. Plaintiffs' counsel stated in a declaration that she had reminded Sutton on November 7, 2008, to search for documents demanded in the deposition subpoena and that she told him again after the completion of his deposition on November 11, 2008, that he should complete his search for documents as soon as possible.

At the hearing on November 21, 2008, plaintiffs' counsel stated that she and the witness had completed the search for documents that morning and found no documents responsive to the deposition subpoena. The court found that plaintiffs had made a strategic decision to prevent the defendants from deposing Sutton and had engaged in an "extraordinary pattern of delay." The court stated that by failing to search for documents before the date by which the court had ordered the deposition to be completed, plaintiffs' counsel had violated the order of November 4. The court stated that the delays had prejudiced the defendants' ability to prepare for trial and for their summary judgment motions. The court therefore imposed an evidence sanction excluding Sutton as a witness.

5. *Summary Judgment Motions*

Borg-Warner filed a summary judgment motion on November 26, 2008, arguing that in light of the exclusion of plaintiffs' sole product identification witness, plaintiffs could not prove that the decedent was exposed to any of its products containing asbestos. Volvo filed a similar motion.[3] Plaintiffs argued in opposition to the motions that Sutton had testified in his deposition that the mechanics in his repair shop worked on Borg-Warner and Volvo products and components that were known to contain asbestos. Plaintiffs argued that the court should reconsider its exclusion of Sutton's testimony and admit the testimony. Plaintiffs' counsel also argued at the hearing that the evidence sanction was unwarranted and unauthorized and that the only appropriate

[3] Several other defendants also moved for summary judgment.

sanction for any misuse of discovery in these circumstances would be a monetary sanction against plaintiffs' counsel.

The court stated at the hearing on the summary judgment motions that the time for reconsideration of the order excluding Sutton's testimony had passed and that the exclusion was proper. The court sustained the defendants' evidentiary objections to Sutton's deposition testimony and granted summary judgment in favor of Borg-Warner and Volvo. The court entered judgments in favor of those defendants on January 26, 2009, and February 3, 2009, respectively. Plaintiffs timely appealed the judgments.

## ***CONTENTIONS***

Plaintiffs contend the trial court had no authority to impose an evidence sanction for a third party deponent's purported failure to comply with a deposition subpoena and had no authority to do so on an ex parte application without a noticed motion. Plaintiffs also challenge the validity of the order compelling the Sutton deposition.

## ***DISCUSSION***

1. *Standard of Review*

We review an order imposing a discovery sanction for abuse of discretion. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422 (*New Albertsons*).) An abuse of discretion occurs if, considering the applicable law and all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. (*Ibid.*) "The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted in accordance with the governing rules of law. ' "The discretion of a trial judge is not a whimsical,

uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]" [Citations.]' (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355 [188 Cal.Rptr. 873, 657 P.2d 365].) A decision 'that transgresses the confines of the applicable principles of law is outside the scope of discretion' and is an abuse of discretion. (*City of Sacramento* [*v. Drew* (1989) 207 Cal.App.3d 1287,] 1297.)" (*Ibid.*)

2. *Statutory Framework*

A person who is not a party to the action can be required to testify in an oral deposition and to produce business records, documents, and tangible things at the deposition. (Code Civ. Proc., §§ 2020.010, 2020.510.)[4] If the deponent is "an officer, director, managing agent, or employee of a party" to the action, service of a deposition notice is sufficient to require the deponent to appear for deposition, testify, and produce documents or tangible things described in the notice.[5] (§ 2025.280, subd. (a).) Any other nonparty can be compelled to testify and produce documents or tangible things only if the deponent is personally served with a deposition subpoena specifying the time

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[4] All further statutory references are to the Code of Civil Procedure unless stated otherwise.

[5] The discovery statutes refer to such a deponent as a "party-affiliated deponent." (§ 2025.450, subd. (d).) The specified relationship must exist as of the time of the deposition notice for a nonparty to be considered a party-affiliated deponent. (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1398 [applying former § 2025, subd. (h)(1)].)

and place of the deposition and describing the documents and tangible things to be produced. (§§ 2020.220, subd. (b), 2020.310, 2020.510, 2025.280, subd. (b).)

A court, upon a noticed motion, may order a party-affiliated deponent who fails to appear for deposition or fails to produce documents and tangible things demanded in a deposition notice to attend and testify in a deposition and to produce any documents and tangible things demanded in the notice. (§§ 2025.450, 2025.480.) If a party-affiliated deponent fails to obey such an order, the court, upon a noticed motion, may impose a monetary sanction against the deponent, and may impose against the party with which the deponent is affiliated monetary, issue, evidence, or terminating sanctions. (§§ 2025.450, subd. (d), 2025.480, subd. (g); see § 2023.030.)

A court, upon a noticed motion, also may order a nonparty to comply with a deposition subpoena. (§ 1987.1, subd. (a); see also § 2025.480.) Moreover, disobedience of a deposition subpoena is a contempt of court for which a court, upon a noticed motion, may punish a nonparty even without a prior order compelling compliance. (§§ 1209, subd. (a)(9), 1991.1, 2020.240, 2023.030, subd. (e), 2025.440, subd. (b).) Other remedies against a nonparty for failure to appear for a deposition pursuant to a deposition subpoena include a civil action for damages and a $500 statutory penalty (§ 1992) and an arrest warrant (§ 1993). There is no statutory provision, however, authorizing sanctions, whether monetary or nonmonetary, against a party for disobedience of a deposition subpoena by a nonparty who is not an officer, director, managing agent, or employee of that party.

Section 2023.030 authorizes a court to impose monetary, issue, evidence, terminating, and contempt sanctions "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title." Thus, the authority to impose a discovery sanction under section 2023.030 depends upon and is limited by the authority granted in some other provision of the Civil Discovery Act (§ 2016.010 et seq.). (*New Albertsons, supra*, 168 Cal.App.4th at p. 1422.)

3. *The Exclusion of Testimony Was Not Authorized by Statute*

Sutton was the decedent's former employer and had no current relationship with the decedent at any time during the pendency of this action. Sutton was not an officer, director, managing agent, or employee of any party to this litigation at any time. The fact that plaintiffs' counsel represented Sutton as a witness in this action did not make the deponent an officer, director, managing agent, or employee of a party.

Ford and General Motors personally served a deposition subpoena on Sutton requiring his attendance and production of documents on October 7, 2008. At the request of plaintiffs' counsel, the defendants later postponed the deposition. Rather than use the power of subpoena to require Sutton's attendance and production of documents on a date certain, Ford and General Motors postponed the deposition indefinitely and allowed plaintiffs' counsel to coordinate the rescheduling. There is no indication in the appellate record that Ford and General Motors objected to plaintiffs' counsel assuming that role or sought to enforce their deposition subpoena. For their part, Borg-Warner and Volvo never served a deposition subpoena, but instead apparently relied on others to reschedule the deposition.

The order of November 4, 2008, stated, "the deposition of Arnold Sutton will take place on or before 11-12-08, or sanctions including terminating sanctions may be imposed." The ex parte application by Ford and General Motors referred to the deposition notice by plaintiffs and the deposition subpoena by Ford and General Motors, but did not state whether the defendants sought an order compelling the completion of the deposition pursuant to plaintiffs' deposition notice or compelling compliance with the defendants' deposition subpoena. The ex parte application did not mention the production of documents, although a copy of the deposition subpoena including a demand for production was attached to the application. There was no mention of the production of documents at the hearing on the ex parte application. The order of November 4 did not state whether the court was ordering compliance with the deposition notice or the deposition subpoena, did not refer to the production of documents, and did not state to whom the order was directed.

The court ordered the exclusion of Sutton as a witness on November 21, 2008, on an ex parte application, based on the failure of plaintiffs' counsel to ensure the timely production of documents requested in the deposition subpoena as purportedly required by the order of November 4. The evidence sanction cannot be justified under section 2025.450 or 2025.480 as a sanction for a party-affiliated deponent's failure to comply with a discovery order because Sutton was not a party-affiliated deponent. Regardless of whether the court had the authority to compel plaintiffs' counsel to produce for deposition a third party who was not a party-affiliated deponent, the court had no statutory authority to impose an evidence sanction against plaintiffs for failure to

comply with such an order. Absent some other statutory authority to impose an evidence sanction against a party in these circumstances, there was no basis for the sanction under section 2023.030.

4. *The Defendants Failed to Show Egregious Misconduct Sufficient to Justify the Exclusion of Testimony*

Some courts have held that nonmonetary sanctions for misuse of the discovery process may be imposed in exceptional circumstances even if the sanctions are not expressly authorized by statute. (*New Albertsons, supra*, 168 Cal.App.4th at pp. 1424-1426.) "The general rule that we glean from these opinions is that if it is sufficiently egregious, misconduct committed in connection with the failure to produce evidence in discovery may justify the imposition of nonmonetary sanctions even absent a prior order compelling discovery, or its equivalent. Furthermore, a prior order may not be necessary where it is reasonably clear that obtaining such an order would be futile." (*Id.* at p. 1426.)

Similarly, sanctions may be imposed based on a court's inherent powers to control the litigation. "A court's inherent power to ensure the orderly administration of justice and control the litigation before it derives from its constitutional role and is not dependent on statute. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 267 [279 Cal.Rptr. 576, 807 P.2d 418].) The Legislature may regulate the exercise of the court's inherent powers, as long as the regulation does not materially impair the exercise of those powers. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1103 [29 Cal.Rptr.3d 249, 112 P.3d 636].) The discovery statutes regulate the court's power to impose

sanctions for misuse of the discovery process by providing for the imposition of monetary sanctions in some circumstances and specified nonmonetary sanctions in other circumstances . . . . We conclude that those statutory restrictions on the exercise of the court's inherent sanctioning power are binding unless they materially impair the court's ability to ensure the orderly administration of justice." (*New Albertsons, supra,* 168 Cal.App.4th at p. 1431.)

Sutton was a third party witness who could have been subpoenaed for deposition and the production of documents by any party. Plaintiffs' counsel preemptively noticed Sutton's deposition and caused him to appear and testify voluntarily before the date required by the deposition subpoena served by Ford and General Motors. After the deposition on October 1, 2008, plaintiffs' counsel agreed to coordinate the scheduling of the completion of the deposition, apparently meaning the deposition pursuant to plaintiffs' deposition notice rather than a deposition pursuant to the deposition subpoena served by Ford and General Motors. The record does not support the defendants' argument that plaintiffs' counsel "controlled his [Sutton's] availability and schedule." Instead, the record shows that the defendants voluntarily relied on plaintiffs' counsel to schedule the deposition in lieu of exercising their right to require his attendance and production of documents by subpoena on a date certain.

There is no indication that plaintiffs' counsel agreed to ensure the production of documents requested in the subpoena, or that the defendants reasonably relied on such an assurance, at any time before the court took plaintiffs' counsel to task at the hearing on November 18, 2008.

Ford and General Motors could have sought to enforce compliance with their deposition subpoena or sought some assurance from plaintiffs' counsel that the documents requested in the subpoena would be produced at the deposition. It appears, however, that Ford and General Motors, and the other defendants, did neither and that plaintiffs' counsel offered no such assurance.

The order of November 4, 2008, stated only that the Sutton deposition must take place by November 12, 2008, and did not mention the deposition subpoena or direct plaintiffs' counsel to ensure that the documents requested in the subpoena would be timely produced. The deposition was completed by the date ordered by the court, albeit without the production of documents. The defendants had an opportunity through their own questioning of Sutton to expose any weaknesses in the product identification testimony elicited by plaintiffs' counsel.

Thus, this is not a case in which a party with exclusive control of evidence willfully suppressed or failed to produce evidence that the party was obligated to produce either in response to discovery, as agreed, or as ordered by the court (see *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525; *Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447; *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262 ; *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202; see also *New Albertsons, supra,* 168 Cal.App.4th at pp. 1424-1426 [discussing cases]), willfully caused the destruction of critical evidence (see *Williams v. Russ* (2008) 167 Cal.App.4th 1215), or engaged in other egregious misconduct that deprived another

party of a fair trial (see *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272; *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736; see also *New Albertsons, supra*, 168 Cal.App.4th at pp. 1431-1434 [discussing cases]).

The defendants have not shown that the failure of plaintiffs' counsel to ensure that the search for and production of documents responsive was completed before the completion of the Sutton deposition violated any agreement or court order or constituted egregious misconduct that would deprive the defendants of a fair trial. Without condoning the conduct by plaintiffs' counsel, we conclude that the record here does not establish the sort of egregious misconduct that would justify the imposition of such a severe evidence sanction.

Accordingly, both the order excluding testimony and the orders granting summary judgment based on that order must be vacated. Our reversal of the judgments will result in a reopening of discovery proceedings (Code Civ. Proc., § 2024.020, subd. (a); *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 247) and a renewed opportunity for the defendants to seek to enforce their discovery rights, obtain the appropriate court orders, and move for sanctions as appropriate. In light of our conclusion, we need not discuss the impact of the absence of a noticed motion for sanctions on the validity of the order of November 4, 2008.

## *DISPOSITION*

The judgment is reversed with directions to the trial court to vacate the order of November 4, 2008, and the orders granting summary judgment in favor of Borg-Warner and Volvo. Plaintiffs are entitled to recover their costs on appeal.

***NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS***

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING J.